MOTION FILED
APR 2 3 1998

(5)

No. 97-1579

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND
UNITED WASTE SYSTEMS, INC.,
Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), the National Solid Wastes Management Association (NSWMA) hereby moves for leave to file an amicus brief with the Court in the captioned proceeding. Respondent Western Lake Superior Sanitary District withheld consent to NSWMA's request for consent to file an amicus curiae brief. Petitioners Zenith/Kremer Waste Systems, Inc. and United Waste Systems, Inc. have consented to the filing of this amicus curiae brief and their letter of consent has been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

NSWMA is a not-for-profit trade association whose 1700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal facilities, waste recyclers, and firms

providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is local efforts to direct the movement of solid waste to favored public sector facilities. NSWMA and its members historically have opposed laws (known as "flow control") requiring that solid waste be disposed at specific, local facilities. In 1994, this Court ruled that such laws violate the Commerce Clause. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

In the wake of the *Carbone* decision and its declaration that "flow control ordinance[s] [are] just one more instance of local processing requirements that we long have held invalid," *Carbone*, 511 U.S. at 391, local government entities have sought by other means to accomplish the same end. The fee and subsidy scheme at issue here is one such example. Because such schemes obstruct the interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of the waste disposal fee and subsidy at issue in this case.

CONCLUSION

NSWMA requests that its motion for leave to file an amicus brief in the captioned proceeding be granted.

Respectfully submitted,

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Dated: April 23, 1998

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BRIEF FOR THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE AMICUS CURIAE

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 1700 member companies are engaged in the full spectrum of waste management services.* NSWMA's members include collectors and transporters of solid and hazardous waste, operators of solid and hazardous waste treatment, storage, and disposal facilities, waste recyclers, and firms providing legal, financial, and consulting services to the

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* Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is local efforts to direct the movement of solid waste to favored public sector facilities. NSWMA and its members historically have opposed laws (known as "flow control") requiring that solid waste be disposed at specific local facilities. In 1994, this Court held that such laws violate the Commerce Clause because they block the sale of waste-handling services across state lines. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

In the wake of the *Carbone* decision and its declaration that "flow control ordinance[s] [are] just one more instance of local processing requirements that we long have held invalid," *Carbone*, 511 U.S. at 391, local government entities have sought by other means to accomplish the same end.[1] The fee and subsidy scheme at issue here is one such example. Because such schemes obstruct the

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[1] See, *e.g.*, *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1173 (8th Cir.), *cert. denied*, 118 S. Ct. 643 (1997) (distinguishing intrastate and interstate flow control restrictions); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996) (town assumed solid waste collection and disposal); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) (private contract with waste hauler used to justify continued reliance on local facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1265 (1996) (allegedly neutral procurement method used to justify continued reliance on flow control); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997) (award of private waste franchise used to argue in favor of continued use of local facility); *Barker Bros. Waste, Inc. v. Dyer County*, 923 F. Supp. 1042 (W.D. Tenn. 1996) (exclusive collection contract used to favor local disposal facility).

interstate movement of waste, NSWMA's members are directly and adversely affected by such provisions. They accordingly have a strong interest in presenting their views on the constitutionality of the waste disposal fee and subsidy at issue in this case.

ARGUMENT

THE CONSTITUTIONALITY OF GOVERNMENTAL FEE AND SUBSIDY SCHEMES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE WASTE INDUSTRY.

Prior to this Court's decision in *Carbone*, many communities imposed flow control even though there are no public health or environmental benefits associated with such measures. EPA, *Report to Congress on Flow Control and Municipal Solid Waste* (Mar. 1995) at II-6. In *Carbone*, the Court invalidated on Commerce Clause grounds a local ordinance that required disposal of waste materials at a favored local facility. Dozens of flow control ordinances were affected by that critical decision.

Since *Carbone*, some local governments have sought to reestablish flow control by combining the powerful incentive of the marketplace and their own taxing authority. These localities are using their taxing power to reduce tipping fees at favored facilities and subsidizing them via the imposition of a per ton waste management charge. Although such fee/subsidy arrangements differ cosmetically from flow control, they share all of its constitutional infirmities. Further, such fees provide public sector officials with an unfair advantage over NSWMA members, who do not possess the uniquely governmental ability to subsidize their operations through the imposition of taxes. And, in this case, the "waste management charge" was imposed by unelected county appointed officials who are not politically accountable for this new and unnecessary charge.

The certiorari petition sets forth in detail (Pet. 12-23) the flaws in the Minnesota Supreme Court's legal analysis. Our purpose in filing this amicus brief is not to duplicate that effort but to explain to the Court the importance of the issue to the solid waste industry. The freedom of non-Minnesota disposal facilities to compete with Western Lake Superior Sanitary District ("WLSSD") is severely compromised by the decision below. Pet. at 5 (describing impact of WLSSD's fee/subsidy scheme on Wisconsin and Michigan landfills). The Minnesota Supreme Court's endorsement of tax and subsidy schemes threatens the safe, environmentally protective and cost-effective movement of waste materials across state borders.[2] It severely undercuts this Court's recent decisions in *Carbone* and *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), and violates the dormant Commerce Clause's prohibition against the "economic Balkanization" of the nation's economy and markets. *Camps Newfound/Owatonna, Inc. v. Town of Healy*, 117 S. Ct. 1590, 1599 (1997) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

Perhaps most critically, the decision below threatens to resurrect uncertainty over the constitutional principles governing local waste disposal restrictions that led this Court to grant certiorari in *Carbone*. Unlike exclusive franchise arrangements and market participant schemes that have been upheld by federal appellate courts since *Carbone*, this case presents an explicit attempt to discriminate against interstate commerce and the Court should act now to clarify whether governmental units may discriminate against interstate commerce in waste disposal services through use of a fee/subsidy scheme designed to provide financial advantages to a favored disposal facility, and therefore prevent out-of-state facilities which do not receive such a subsidy, from competing with it.

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[2] The interstate movement of waste materials is an issue with national implications. According to a recent study, 49 states exported some of their solid waste to other states. Ed Repa, Interstate Movement 1995 Update, *Waste Age* (June 1997) at 44.

A. Governmental Fee And Subsidy Schemes Are Being Enacted Nationwide In Response To The Court's Ruling In *Carbone*.

In its decision, the Minnesota Supreme Court praises WLSSD's "tax and subsidy scheme" and encourages it "as a model for other communities." App. at A-14. This scheme has already taken root in several jurisdictions across the United States, and will become used more frequently unless this Court clarifies the limited extent, if any, to which such schemes are permitted.[3] The likelihood of conflicting legal decisions by state and federal courts reviewing such schemes in the absence of Supreme Court guidance regarding this issue, and the resulting distortion of the free market for waste materials, should not be dismissed lightly.

Similar tax and subsidy schemes are being implemented in New Jersey as that state grapples with the demise of flow control. Despite the strict prohibition against flow control announced in *Carbone*, it was not until this Court denied certiorari from the Third Circuit's decision in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 112 F.3d 652 (3d Cir.), *cert. denied*, 118 S. Ct. 412 (1997) that New Jersey officials finally accepted that their state-wide flow control scheme was unconstitutional. But even then, many counties have not repudiated their invalid flow control laws. Instead, to ensure that waste continues to flow to favored in-county facilities, numerous New Jersey counties have recently reduced tipping fees at these facilities and enacted or proposed so-called "environmental investment charges" (EICs) to subsidize those facilities.[4] Using these

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[3] See *West Lynn Creamery*, 512 U.S. at 211 (Scalia, J., concurring) (stating that a state may "subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund").

[4] See, *e.g.*, Atlantic County Ord. 4-1998 (Mar. 10, 1998) (amending Atlantic County's Solid Waste Plan to assess a $31 per ton EIC); Burlington County Res. 111 (Feb. 25, 1998) (amending

charges, New Jersey counties (like WLSSD in the current case) are now seeking to assess a fee on all solid waste generated within a county to increase the price of disposal for both in-state and out-of-state disposal, but then use the EIC's proceeds to subsidize in-county waste facilities and reduce the effective in-state price. These counties recognize the political expediency of such measures, which allow them to avoid raising property or other taxes to pay for these local facilities. Instead, these counties have reduced tipping fees dramatically at their waste disposal facilities to enable them to compete with efficient, out-of-state private sector facilities, and are seeking to recoup the difference through EICs charged to waste haulers who pass them through to their customers. Such fees are becoming more popular as a way for local governments to avoid *Carbone's* prohibition against flow control ordinances that discriminate against interstate commerce.[5]

B. The Minnesota Decision Is Contrary To This Court's Commerce Clause Precedent And Is Creating Uncertainty In The Industry Over The Limits On Fee And Subsidy Schemes.

In *Carbone*, this Court declared that "[t]he Commerce Clause presumes a national market free from local legisla-

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Burlington County's District Solid Waste Management Plan to charge a $30 per ton EIC); Gloucester County District Waste Management Plan Amendment (Feb. 18, 1998) (amending Gloucester County's District Solid Waste Management Plan to collect a $21.96 per ton EIC). Several other New Jersey counties have reportedly enacted or proposed similar EIC's. Some of these EIC's are awaiting state approval and are the subject of several lawsuits filed by municipalities and the waste industry in New Jersey state court.

[5] For example, after Nashville, Tennessee's flow control ordinance was invalidated, see *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3523 (U.S. Feb. 2, 1998) (No. 97-1259), municipal authorities cut the tipping fee and proposed an $8.00 per ton charge to subsidize their incinerator. Richard Lawson, Metro Delaying Solid Waste Vote to Study Impact, *Nashville Business Journal* (Mar. 16, 1998) at 5.

tion that discriminates in favor of local interests." 511 U.S. at 393. Yet the fee and subsidy scheme developed by WLSSD does precisely that—it interferes with and discriminates against the movement of waste materials in interstate commerce.

Prior to *Carbone*, WLSSD enacted flow control regulations that directed all solid waste generated within its borders to its incinerator. With the demise of flow control, WLSSD cut its tipping fee by over $23 per ton and a $28.25 per ton waste management charge on all property owners and occupants in the district. As both WLSSD and the court below readily admit, WLSSD is subsidizing the incinerator from revenue collected via the waste management charge. Like the arrangement in *Carbone*, this fee/subsidy scheme prevents other disposal facilities—including all out-of-state facilities—from fairly competing for the waste generated in the district. Contrary to this Court's admonition, WLSSD "hoards solid waste and the demand to get rid of it." *Id.* at 392. The purposeful imposition of costs on out-of-state businesses through discriminatory taxes is not permitted under the Commerce Clause.

The decision below also conflicts with the tax/subsidy arrangement struck down by the Court in *West Lynn Creamery*. In that decision, this Court addressed and invalidated exactly the same type of two-step scheme at issue here. There, the Court held that a Massachusetts pricing order that imposed an assessment on all milk sold to Massachusetts retailers was unconstitutional, even where the assessment was applied to milk produced both in-state and out-of-state, where proceeds of the assessment subsidize only in-state producers. *West Lynn Creamery*, 512 U.S. at 194. The Court determined that this arrangement enabled higher cost in-state milk producers to compete with lower cost producers in other states. *Id.* at 191-92. Similarly, the fee/subsidy scheme here impermissibly burdens interstate commerce by effectively taxing out-of-state waste disposal services more heavily only because they are

outside the district. As petitioners' correctly observe, WLSSD has achieved exactly what the Commerce Clause prohibits: The isolation of a state "from a problem common to the several States by raising barriers to the free flow of interstate trade." Pet. at 14 (quoting *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339-40 (1992)).

* * * *

Our brief has focused on the effect of the decision below on the waste industry. As the petition observes, however, the Minnesota Supreme Court's rationale is not limited to the waste context. The fee and subsidy scheme at issue here is applicable to all municipal facilities and, as demonstrated by *West Lynn Creamery*, can be imposed by imprudent state action. The Court should grant the petition for a writ of certiorari in order to clarify the limits that the dormant Commerce Clause imposes on governmental efforts to subsidize a local activity when such efforts have a discriminatory effect on interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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